The Attorney General of Texas

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Mr. Wade Adkins
City Attorney
Department of Law
City Hall
Fort Worth, Texas 76102

Open Records Decision No. 328

Re: Records of housing repair projects funded by the city of Fort Worth

Dear Mr. Adkins:

You have asked whether the Open Records Act, article 6252-17a, V.T.C.S., requires you to comply with a request for files concerning housing repair projects funded under the Neighborhood Improvement Program of the city of Fort Worth. These files contain, inter alia, detailed information regarding repair work done on various houses, and information concerning the owners of these houses. You contend that these files may be withheld under sections 3(a)(1), 3(a)(3), or 3(a)(11) of the Open Records Act.

Section 3(a)(3) excepts from required disclosure:

> information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

The mere chance of litigation is not sufficient to trigger section 3(a)(3). Open Records Decision Nos. 311 (1982); 288 (1981); 183 (1978). This exception is applicable only where "litigation is pending or reasonably anticipated in regard to a specific matter as opposed to a remote possibility among a group or classification." Open Records Decision No. 139 (1976).

You advise that these housing repair projects are currently under investigation by the city's police department, and that "it is anticipated that criminal and/or civil litigation may result from the investigation, which has not yet been concluded." As we noted,

however, the fact that litigation "may result" is insufficient to invoke section 3(a)(3). Before we may conclude that section 3(a)(3) applies, we must be presented with concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. See, e.g., Open Records Decision Nos. 288, 266 (1981). No such evidence has been presented here.

Section 3(a)(11) excepts:

> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency.

This section only permits the withholding of advice, opinions and recommendations. Open Records Decision Nos. 315, 308 (1982); 273 (1981). In connection with your request, you submitted one file and stated that it is representative of the other files at issue here. We have examined this file, and we conclude that none of the information contained therein is "advice, opinion, and recommendation." Since we do not have the other files before us, we cannot determine whether any information in those files may be excepted under section 3(a)(11). You must make this determination, at least in the first instance, in accordance with the section 3(a)(11) test articulated above.

Section 3(a)(1) excepts from required disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." We have found no statute or constitutional provision which is applicable here. If this information is confidential, therefore, it must be because the test for common law or constitutional privacy is satisfied.

In Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976), the Texas Supreme Court recognized two kinds of section 3(a)(1) privacy. "Constitutional" privacy protects information within one of the "zones of privacy" described by the United States Supreme Court in Roe v. Wade, 410 U.S. 113 (1973) and Paul v. Davis, 424 U.S. 693 (1976). These "zones of privacy" protect matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. "Common law" privacy, on the other hand, protects information which contains:

> highly intimate or embarrassing facts about a person's private affairs, such that its publication would be highly objectionable to a person of ordinary sensibilities.

540 S.W.2d at 683. In addition, the information must "not [be] of legitimate concern to the public." Id. at 685.

As we observed in Open Records Decision No. 268 (1981), "the scope of common law privacy is narrow indeed." This office has held that the supreme court's exacting standard for common law privacy requires the disclosure of, inter alia, the names and addresses of former residents of a public housing development, Open Records Decision No. 318 (1982); the home addresses of public employees, Open Records Decision No. 169 (1977); certain financial records of individuals, Open Records Decision Nos. 246 (1980); 201 (1978); and most medical information relating to individuals, Open Records Decision Nos. 262, 260, 258 (1980).

The information in the "representative" file that you submitted is not excepted by a constitutional right of privacy. With respect to common law privacy, we are unable to conclude that the release of any of this information would be "highly objectionable to a person of ordinary sensibilities" because it contains "highly intimate or embarrassing facts about a person's private affairs," and that the information is of no legitimate concern to the public.

Since we do not have all of the files before us, we cannot say that none of the information in any file would be protected by common law privacy. For example, some medical information pertaining to the owners of the houses in question might be protected. See, e.g., Open Records Decision Nos. 262, 260, and 258 (1980). Once again, you must make the initial determination as to whether any information regarding the owners is protected under the privacy tests set forth above.

Very truly yours,

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